FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 176

GEORGE C. REINING,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ALEX W. SWORDS,
Counsel for Petitioner.

ROBERT S. LINK, JR.,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

The petitioner, George G. Reining, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 20, 1948, affirming a judgment of the United States District Court in and for the Southern District of Florida, entered June 9th, 1947, said verdict and sentence of the District Court as to counts Nos. 3 and 5 being set aside but the judgment otherwise affirmed.

Opinions Below

The opinion of the Circuit Court of Appeals appears (R. 271-276). The opinion of the United States District Court for the Southern District of Florida appears (R. 262-263).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered April 20, 1948 (R. 277). The petition for rehearing was denied on May 27, 1948 (R. 281). The jurisdiction of this Court is invoked, Sec. 347, of 28 U. S. C. Rule 37 of the United States Supreme Court. On June 25th Mr. Justice Black extended the time to file this petition for certiorari until July 26th (R. 283).

Statutes Involved

Section 338, Title 18 U. S. C.
Section 77 Q (a) (1), Title 15 U. S. C.
Act of March 16, 1878, 20 Stat. 30 c. 37.

Question Presented

Is it not reversible error for the District Attorney, in argument, to call attention to the failure of the defendant to take the stand, unless the Court sharply, empatically, promptly and in unmistakable and positive terms, advises the jury that the matter is improper and they should give no consideration thereto.

Statement of the Case

On February 23, 1945, an indictment was returned in the United States District Court for the Southern District of Florida, during the February term thereof, consisting of six counts charging that petitioner and one other did devise and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and

fraudulent pretenses. The indictment sets out various overt acts, alleged to have been committed and includes a general conspiracy charge.

At the time the petitioner, Reining, was arraigned, the alleged defendant and co-conspirator did not appear in court. The United States Attorney moved to sever as to the absent defendant and to escheat his bond. Both motions were duly granted and the defendant was placed on trial before a jury and before the Honorable William J. Barker, United States District Judge. After a lengthy trial, petitioner was convicted by the jury on all six counts of the indictment and was sentenced by the court to serve one year on each count, sentences to run consecutively.

Petitioner thereupon appealed to the United States Circuit Court of Appeals for the Fifth Circuit, which court affirmed the judgment of conviction as to counts Nos. 1, 2, 4 and 6 and reversed judgment as to counts 3 and 5. Immediately thereafter, petitioner sought a rehearing before the Fifth Circuit Court of Appeals, which rehearing was denied.

Reasons for Granting Writ

Both the District Court and the appellate court have so far departed from the accepted and usual course of judicial procedure as to call for an exercise of this Court's power of supervision. The action of the District Court in permitting the United States Attorney to comment on petitioner's failure to take the stand and the action of the Circui Court of Appeals for the Fifth Circuit, in itself giving, among its reasons for judgment, the failure of petitioner to explain or deny is a flagrant violation of the accepted and usual course of judicial procedure and is diametrically opposed to the decisions of other Circuit Courts of Appeal.

SUPREME COURT OF THE UNITED STATES

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BRIEF IN SUPPORT OF THE PETITION

Facts

Petitioner jointly indicted with another in the United States District Court for the Southern District of Florida, but was tried alone. At the conclusion of the presentation of the evidence by the Government, the Government rested. A recess was held and, thereafter, the Government moved to reopen the case and introduced further evidence, over the objection of counsel for petitioner. The objection was overruled and, thereupon, the defense rested on petitioner's plea of not guilty, entered at the outset of the trial.

Following this, the United States Attorney made the following argument:

> "Now this letter is in Count 1. That is the one that is alleged, and you have to believe beyond a reasonable

doubt; first, that there was a scheme devised by this defendant, either by himself or in connection with Boyer, and that they caused—either put or caused to be placed in the mail for transmission that letter. There is no question but that that letter went through the mail from Miami to A. C. Smith of San Antonio, Texas, and that he received it and produced it here. *There is no dispute about that and no denial.*" (R. 225)

After some other argument to the court by counsel for petitioner and for the Government (R. 226, 227, 228), we find the court's opinion on pages 229 and 230, as follows:

"The Court: Let me finish this first. The part of the argument that is excepted to which has to do with the District Attorney's remarks to the jury that there was no dispute about a certain letter and no denial—The Court observed the District Attorney at the time this part of the argument was made and recalls that it was made after both counsel for the defense had argued the case, and I did not observe any gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark here that there was no dispute and no denial. My interpretation of the remark was that he had reference to the argument of counsel. His argument was in rebuttal of counsel for defendants; and he was dwelling upon that when he said there was no dispute about that and no denial. Therefore the Court did not interpret it to mean that the defendant hadn't testified or that the defendant himself hadn't denied it. I don't think that any juror could have so interpreted it. I don't see any other logical or reasonable interpretation of that remark except that, in answer to counsel's argument, he stated that there was no dispute and no denial as to this particular letter. The Court is of the opinion and finds that there has been no violation of the rules or the law with reference to directing the attention of the Jury to the fact that the defendant has not taken the witness sand. There-

fore the Court denies that motion of the defendant to declare a mistrial. And now we will take up the other matter of the bond.

Mr. Graham: May it please the Court, I would just like to make one more remark there. That it's inconceivable that the District Attorney could have been referring to anybody except the defendant when he said it hadn't been denied.

The Court: That's your interpretation which you have a right to have, Mr. Graham. I disagree with you on that, I shall let the remark stand."

Subsequent to all of this, the case went to the jury and a verdict of guilty on all six counts was duly returned by the jury. After the verdict, the petitioner was sentenced by the court to serve one year on each of the six counts, said sentences to run consecutively. Thereupon, the petitioner prosecuted an appeal to the Fifth Circuit Court of Appeals and that court affirmed in part and reversed in part and, in the judgment of the appellate court (R. 273), the appellate court said:

"• • • He offered no testimony whatever in explanation or denial."

And then (R. 276)

"• • • the facts stated are indeed even now undisputed and undenied by anyone • • •."

Argument

This Honorable Court held, in *Wilson* v. *United States*, 16 S. Ct. 765, 37 L. Ed. 650, that the act of March 16, 1878 (20 Stat. 30 c. 37) restrains both the Court and counsel from commenting upon the failure of an accused to testify. This doctrine was followed in the case of *De Mayo* v. *United States* (2 cases), 32 F. (2d) 472, wherein the court held that, for a District Attorney in argument to call attention,

though inadvertently, to the failure of the defendant to take the stand, is reversible error unless the Court sharply, emphatically, promptly and in unmistakable and positive terms advises the jury that the matter is improper and they should give no consideration thereto.

In the case at bar, both the Government and the defense availed themselves of their right to make opening statements. The defense counsel reiterated defendant's plea of not guilty and made a complete and emphatic denial of each and every allegation in the indictment in the following language:

> "That he had no scheme of any kind to defraud—took no part or participated in any way in defrauding anyone; and did not at any time ever—never has and especially in connection with these transactions— enter any mail or parcel advertisement or other article in the mail for the purpose of furthering any scheme to defraud anyone."

Surely there could have been no more positive and emphatic denial in behalf of this petitioner as to his having participated in any of the violations as set forth in the indictment. The petitioner had pleaded not guilty which, in itself, denies all of the allegations of the indictment and requires the Government to prove his guilt beyond a reasonable doubt. The United States could not have been referring to the argument of defense counsel when he stated

> "There is no question but that the letter went through the mail from Miami to A. C. Smith, San Antonio, Texas, and that he received it and produced it here. There is no dispute about that and no denial."

No one except the defendant in the lower court and the petitioner in this Court could have denied that he mailed that letter to Mr. Smith in San Antonio, Texas.

The Court below does not recall seeing the United States

Attorney turn and point to the petitioner at the time he made this statement but the Court below did not follow the jurisprudence set forth in the *De Mayo* case and did not sharply, emphatically, promptly and in unmistakable and positive terms advise the jury that this actoin was improper and that they should give no consideration thereto.

When the case reached the Fifth Circuit Court of Appeals, that court affirmed the lower court and upheld the District Judge in his opinion as to what the United States attorney referred to when he stated that there is no denial. But the most conclusive and powerfully persuasive argument of all that the United States Attorney was referring to the failure of the petitioner to take the stand is the fact that twice in the appellate court's own reasons for judgment they held, first

> "• • • he offered no testimony whatever in explanation or denial" (R. 273).

and

> "• • • the facts stated are indeed even now undisputed and undenied by anyone • • •" (R. 276).

For these reasons, it is respectfully submitted that the petition for Writ of Certiorari should be granted.

ALEX W. SWORDS,
Counsel for Petitioner.

ROBERT S. LINK, JR.,
Of Counsel.

FILE COPY

IN THE

Supreme Court of the United States

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GEORGE G. REINING

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THE UNITED STATES OF AMERICA

MOTION TO AMEND THE ORIGINAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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MOTION TO AMEND THE ORIGINAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, George G. Reining, respectfully prays that the motion to amend the original petition for a writ of certiorari, filed herein on July 26, 1948 (R. 283), which petition sets forth therein all of the essential facts, lists the opinion of the Court below and the jurisdiction of this Honorable Court, be granted and that this Court consider the additional legal reasons why the judgment of the Circuit Court of Appeals for the Fifth Circuit, entered April 20, 1948, be set aside and the verdict and sentence of the District Court be vacated.

MOTION TO AMEND ORIGINAL PETITION

Comes now, George G. Reining, the petitioner and most respectfully moves this Honorable Court to allow him to file an amendment to his original petition for a writ of certiorari and to present further and additional grounds for the granting of the writ and for reasons say:

That in the original petition the attorneys for the petitioner failed to include therein very vital Constitutional questions and thereby the rights of the petitioner will be greatly effected unless he is permitted to amend the original petition filed herein.

QUESTIONS PRESENTED BY AMENDMENTS

1. Is it not reversible error to compel the accused, petitioner, to be a witness against himself, contrary to the Fifth Amendment to the Constitution?

> *Fifth Amendment.* "No person * * * shall be compelled in any criminal case to be a witness against himself."

2. Is it not reversible error to convict the accused by witnesses who are not produced in court and not confronted by the accused and the accused not given the right to cross-examine?

> *Sixth Amendment.* "In all criminal prosecutions, the accused shall * * * be confronted with the witnesses against him * * *."

STATEMENT OF FACTS FROM RECORD

After the prosecution had closed its case the prosecutor learned that the defendant, the petitioner herein, was not going to take the stand and testify and that the defense was closing its case without offering any testimony and moving for a directed verdict, he, the prosecutor, moved

the Court for permission to reopen the Government's case and present additional testimony, which motion, over the objections of the defendant, was granted and the prosecution realizing that there was no evidence to connect the defendant, petitioner herein, with using the mails, offered in evidence the criminal appearance bond which the defendant had been forced to sign in Connecticut for his appearance in Florida. Proper objections were made by defendant's attorneys.

This bond was taken before a United States Commissioner in the State of Connecticut and allegedly signed by the defendant and the prosecution offered same in evidence so that the jurors could compare the signature on the bond with the signature of the only letter allegedly signed by the defendant (R. 210).

The prosecution failed to have or produce the United States Commissioner, the only person who could testify as to the defendant's signature on this bond, as a witness and the prosecutor had the Assistant Clerk of the District Court in Florida testify that the said bond was among the papers in the case. He made no effort to qualify the clerk as a hand-writing expert and the clerk had never seen the defendant write nor did not know his signature, but could only testify that said bond was forwarded to Florida by some person, assumed of course, to be the United States Commissioner in Connecticut.

ARGUMENT

As quoted above the Constitution prohibits the forcing of an accused to be made a witness against himself in a criminal case and when the United States forces a man to sign a criminal bond it cannot use that bond against him as was done in this case and even if the Government was permitted to so use this bond to prove the signature and com-

pare same with a letter in evidence, the accused had the Constitutional right to be confronted by the witness who witnessed the alleged signing of the bond, or to have some hand-writing expert or some person familiar with the hand-writing of the accused testify so that he, the accused, would have his Constitutional right to cross examine such witness, but surely the rule of evidence applicable in civil cases could not apply in a criminal case without violating the Sixth Amendment to the Constitution.

Petitioner respectfully says that three of the rights guaranteed to him by the Constitution were violated by the Court below. *First* as set forth in original petition the prosecutor told the jury that the defendant had not denied that he wrote the letter he offered in evidence, thereby calling attention to the jury that the defendant had not taken the stand in his defense, for while the Government attempts to hold that the prosecutor's remarks were addressed to the attorneys for the defendant, he, and this Honorable Court know that the defendant was the *only person who could possibly deny the signature on that letter* and the prosecutor looked directly at the defendant and without question meant to and did in fact say to the Jury:

"The defendant does not deny writing this letter."

There could be no other interpretation of prosecutor's statement.

Secondly, the prosecution knew that the defendant had been forced to sign the bond in question by the United States Government and to use same in a criminal case against him is unquestionably a violation of his Constitutional rights.

Thirdly, even if the Government had the right to offer said bond in evidence it was necessary to have the witness,

the United States Commissioner, present to confront the defendant and give the defendant the opportunity to cross examine this material witness and here we have a man admittedly convicted on the testimony of, at least one witness, who was not confronted by the defendant. There could be many theories as to who signed this bond and there was but one proper witness and the Government failed to produce this witness and without this witness there was absolutely no evidence before the Court of any using of the mails.

CONCLUSION

It is of a far greater importance to protect the Constitutional rights of the people than it is to convict, even the guilty. Governments crumble and fall by inroads on the people's rights and it is better to stop "in limine" these inroads on the jewel of our Government. The Constitution, than uphold a questionable judgment.

For the reasons presented in the original petition and those presented herein it is respectfully submitted that the petition for a Writ of Certiorari should be granted.

ALEX W. SWORDS,
Counsel for Petitioner.

ROBERT S. LINK, JR.,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1948

No. 176.

GEORGE G. REINING, *Petitioner,*

v.

THE UNITED STATES OF AMERICA.

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ALEX W. SWORDS,
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REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

PRELIMINARY STATEMENT.

The Opinion Below; the Jurisdiction; the Question Presented, and Statement of the Case are fully set forth in the Petition for Writ of Certiorari previously filed herein.

STATEMENT.

At page 3 of the brief for the United States in opposition to the petition for writ of certiorari, the following statement appears:

> "No objection was registered to this statement (that of the prosecuting attorney) at the time, but after the prosecutor had completed his summation *and the jury*

had been excused, petitioner's counsel moved for a mistrial * * * ."[1]

The above statement would make it appear that the jury had retired to consider its verdict before counsel for the defendant, (Reining), objected to the statement of the prosecutor that "There is no dispute about that and no denial" had been made. However, it is not a fact that the jury had been "excused" at the time the objection was made to the statement of the prosecutor. The record discloses (R. 208) that the government had rested its case and the Court recessed until 2 o'clock the following day, at which time the prosecuting attorney moved to reopen the case in order to present certain additional evidence (R. 209, 211). Thereafter, the jury withdrew from the courtroom (R. 211), while the Court heard argument by both sides on several motions. Thereafter, counsel for both prosecution and defense addressed the jury. In the course of the argument of the prosecuting attorney, the statement complained of was made (R. 225). Thereafter (R. 226) the Court recessed until the following morning, whereupon counsel for the defendant moved for a mistrial for the reasons and upon the grounds set forth in the record at p. 226. The Court (R. 226) deferred ruling on that motion. Upon reconvening on May 17, 1947 (R. 227) the Court asked the jury to retire to its room while the Court heard argument in respect of the objectional statement. Thereafter, the Court made its charge to the jury (R. 233-249), whereupon the jury retired to consider its verdict.

ARGUMENT.

Examination of Exhibit 47 (R. 176) will reveal that that letter was purportedly signed by the defendant, George G. Reining. The statement of the prosecuting attorney that—

"there was no dispute about that and no denial"

[1] Parenthetical matter and italics supplied.

had reference only to that letter and to the fact of its having been written and signed by George G. Reining and mailed or caused to be mailed by Reining to A. C. Smith.

The observations of the trial court (R. 229, 230), regarding the prosecutor's statement clearly reveal, that the Court was itself in doubt as to the import of the statement. Its clear duty, under the circumstances, was immediately to have specifically instructed the jury to disregard the statement. The error in this respect was in no wise cured by the statement of the Court appearing at page 248 of the Record. The statement made by the Court, appearing at page 249 of the Record, only served to aggravate the matter, as will be pointed out hereinafter.

There are numerous cases supporting and confirming the *rationale* of the decisions in the case of *Wilson* v. *United States*, 16 S. Ct. 765, 37 L. Ed. 650 and *De Mayo* v. *United States*, 32 Fed. (2d) 472.

This Court, in *Johnson* v. *United States*, 318 U. S. 189, 87 L. Ed. 704, said (318 U. S., p. 199-87 L. Ed., p. 712):

> "* * * We would of course not be concerned with the matter if it turned only on the quality of legal advice which he received. But the responsibility for misuse of the grant of the claim of privilege is the court's. It is the court to whom an accused properly and necessarily looks for protection in such a matter. When it grants the claim of privilege but allows it to be used against the accused to his prejudice, we cannot disregard the matter. That procedure has such potentialities of oppressive use that we will not sanction its use in the federal courts over which we have supervisory powers."

The observations of the trial Court, constituting part of its charge to the Jury, as they appear at pp. 248 and 249 (see Appendix) of the Record, did not have the effect of overcoming the damaging effect of the statement of the prosecuting attorney to the effect that Reining had not denied having written and signed the letter or having mailed it or caused it to be mailed. On the contrary when,

at the request of the prosecuting attorney (Mr. Phillips), the Court enlarged upon its charge, this only served to aggravate the matter. The Court said (R. 249):

> "Whether the remarks of counsel are proper or improper, Gentlemen, are matters for the Court to determine and not for you to determine. * * *"

Petitioner concedes that the statement is a correct statement of the responsibility of the Court, but it was error for the Court to have stopped where it did. It should have referred specifically to the statement of the prosecutor that there had been no denial by the defendant and should have specifically instructed the Jury to disregard the statement.

In the case of *United States* v. *Snyder*, 14 Fed. 554, under facts substantially parallel to those of the case at bar, the trial court immediately corrected the error, and properly instructed the jury regarding the objectionable observations of the prosecuting attorney.

In the case of *McKnight* v. *United States*, 115 Fed. 972, 983 (C.C.A. - 6th Cir.), observations of the trial judge, of import similar to those involved here, were held not to have been cured by the trial court's subsequent statement to the jury upon that subject. In the *McKnight* case, the court quoted from the language of Mr. Justice Field in *Wilson* v. *United States, supra*, as follows:

> "It (the Court) should have said that counsel is forbidden by the statute to make any comment which would create or tend to create a presumption against the defendant from his failure to testify."

In this case the letter referred to by the prosecuting attorney as not having been denied (Exhibit 46, R. 175) could have been denied by the defendant only. In this aspect of the matter, the case of *Linden, et al.* v. *United States*, 296 Fed. 104 (C.C.A.—3rd Cir.) is of significance. The court, in that case said (p. 106):

> " * * * It follows, therefore, that the only persons who could possibly contradict their testimony were the de-

> fendants themselves. Obviously, then, the only person to whom the learned trial judge could have alluded as not having contradicted the government's testimony and as not having given an 'explanation of the transaction' were the defendants. This is so clear that it does not require discussion. We are of opinion that this part of the court's charge involved error and that the conviction thereunder was not valid. * * *"

In the *Linden* case, the objectionable language of the court was as follows (p. 105, 106):

> "Now, there is not any evidence at all in explanation of that transaction, and there you have the bare facts."

In the case of *Nobile* v. *United States,* 284 Fed. 253 (C.C. A. - 3rd Cir.) the error assigned was based upon an observation of the court in its charge to the jury. In that case the court pointed out that the statute (Act of March 16, 1878, 20 Stat. 30, c. 37) was not only a restraint upon counsel but upon the courts. This principle has been recognized and affirmed by this Court in several cases, including that of *Johnson* v. *United States, supra.*

In *Barnes* v. *United States,* 8 Fed. (2d) 832 (C.C.A. - 8th Cir.) that court, reversed the lower court and held that prejudicial error had been committed as result of colloquy between the court and the counsel, the court said (p. 834):

> "This assignment presents a serious question. The defendants had not testified in their own behalf. The court promptly declared the statement to be highly improper. He did not, however, *charge the jury to disregard its effect, and refused to accede to the demand of counsel that the jury be discharged.* The colloquy that ensued undoubtedly emphasized and made prominent the potential application of the language used. We feel, therefore, constrained to hold that prejudicial error was thereby committed. It is true, but for the pointed remarks of counsel for defendants, the application might have passed unnoticed; nevertheless, this entire colloquy was precipitated by the original improper statement of the prosecutor, and the language

employed was extreme and striking in its terms. It must be noted that the sale of the opium took place in the night, when no one but the defendant Bowers and the witness Pryor were present. There were no others, besides the defendant, Bowers, who could have contradicted the testimony of Pryor as to the sale, and pronounced it false. Of course, the sale itself, and the circumstances under which it was made, constituted the gist of the offense, and while, in our judgment, there was ample testimony to establish clearly the guilt of the defendants, nevertheless the protection of defendants against comments of this nature is expressly safeguarded by statute and jealously preserved by the courts."[1]

In the instant case, as in the *Barnes* and many other cases, the only person who could have denied writing the letter to A. C. Smith was the person who was supposed to have written it, i. e., the defendant, George G. Reining.

As has been pointed out, after the prosecution had rested, but before the case went to the Jury, the prosecutor moved to reopen the case in order to put in additional evidence, which consisted of the appearance bond of Georg G. Reining such document bearing Reining's known signature, (Exhibit 48, R. 210, 11). This document was offered by the prosecutor (R. 209) for the purpose of establishing the signature of George G. Reining on the bond, for comparison with other "signatures" of George G. Reining, which included the "signature" "Geo. G. Reining", appearing on Exhibit 46 (R. 175), to which the prosecuting attorney had specifically alluded (R. 225) as not having been denied.

The statute was designed to protect persons accused of crime in those circumstances, where, in the exercise of their fundamental right, they see fit not to take the witness stand in their own defense. In this case, the language of the prosecuting attorney can be construed only as calling the attention of the Jury to the fact that the defendant did not deny the letter, or his purported signature thereon. It

[1] Italics supplied.

was the manifest duty of the trial court to have instructed the jury specifically and immediately that no inference unfavorable to the defendant could be drawn therefrom. The Court's failure to do so was dereliction and in clear derogation of the rights of the accused.

As has been pointed out by this Court, neither trial courts nor prosecuting attorneys will be permitted to pare away from the fundamental constitutional and statutory safeguards afforded persons accused of crime under the laws of the United States. It is suggested that unless this Court grants the petition for writ of certiorari and corrects the error here complained of, this case may later be relied upon in other cases and these, in turn, in still other cases, thus finally to destroy these important safeguards and gradually to emasculate the decision of this Court in *Wilson* v. *United States, supra.*

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be granted, the decision of the lower court reversed, and the cause remanded. *Helvering* v. *Tyng, Helvering* v. *Buchsbaum,* 308 U. S. 527, 84 L. Ed. 445.

ALEX W. SWORDS,
Counsel for Petitioner.

Of Counsel
ROBERT S. LINK, JR.
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APPENDIX.

The Court:

I will charge you further, Gentlemen, in addition to what the Court has already said to you. The Jury is instructed that the burden of proving every essential element of the case rests with the prosecution and that the defendant does not have to offer any defense or to disprove any testimony presented by the prosecution; that he does not have to testify in his own defense or to offer any witnesses in his defense unless he so desires and that the prosecution has no legal right to comment on the lack of such failure to testify or to offer witnesses in his defense.

Mr. Phillips:

That last part is not exactly clear.

The Court:

Further, Gentlemen, the Court instructs you that while the law permits the defendant to testify, he is under no obligation to do so, and his failure to d. so creates no presumption against him; and you are not authorized to draw any deduction from the failure of a person to testify—that is, the defendant to testify. With his silence you have nothing to do, and you are to decide the case with reference alone to the testimony actually introduced without regard to what might not or what might have been found if other persons had testified.

Mr. Phillips:

If Your Honor please, in view of the wording of the last clause of the charge requested, I ask you to charge the Jury that the question of whether or not the United States Attorney in making his argument made any improper reference or anything like that to the failure of the defendant to take the stand is a matter for the Court to determine and they have nothing to do with it. In other words, it's not a question for them to determine.

The Court:

Whether the remarks of counsel are proper or improper, Gentlemen, are matters for the Court to determine and not for you to determine. I will say this, Gentlemen: That counsel in the case are, as you know, lawyers representing one or the other side of the case, and they are not witnesses, and any statement that they might make before you is not

to be taken as testimony unless of course they have been sworn and have testified as witnesses. Their purpose in the case is to assist you and the Court in the trial of the case and the presentation of the case; and then to present to you their own deductions and conclusions that they drew from the evidence to give you to consider for your enlightenment and assistance. And so I just caution you, Gentlemen, that anything that might be said or any testimony that might be quoted by counsel in the case, which sometimes inadvertently is misquoted, you are not to take counsel's statement of what the testimony was here as final. It is your recollection of the testimony, Gentlemen, that counts—the testimony that you have heard from the witnesses on the stand, as you remember it, and not what counsel or the Court may say to you the testimony was in the case.

All right, Gentlemen, you may retire now and consider your verdict.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 176

GEORGE C. REINING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 271-276) is reported at 167 F. 2d 362.

JURISDICTION

The judgment of the circuit court of appeals was entered April 20, 1948 (R. 277), and a petition for rehearing (R. 278-280) was denied May 27, 1948 (R. 281). On June 25, 1948, by order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to July 26,

1948 (R. 283), and the petition was filed on that date. The jurisdiction of this Court was invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (now 28 U. S. C. 1254). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether a motion for a mistrial, based on a statement of the prosecutor to the jury allegedly calling attention to petitioner's failure to testify, was properly denied.

STATEMENT

Petitioner was convicted in the District Court for the Southern District of Florida on each of five counts charging use of the mails to defraud, and, on a sixth count, of conspiring to do so (R. 1-26, 249-250). He was sentenced to one year's imprisonment on each count, the terms to run consecutively (R. 262-263). On appeal, his conviction was reversed as to counts 3 and 5 on the ground of insufficiency of the evidence (R. 273, 277), but was affirmed as to all other counts (R. 277).

Since petitioner does not question the sufficiency of the evidence in respect of those counts as to which his conviction was affirmed, it is unnecessary to review it here. The general nature of the scheme to defraud, however, is set forth in the opinion of the circuit court of appeals (R. 272-273).

The motion for a mistrial, the denial of which is the only alleged error relied on in the petition

for a writ of certiorari, was made under the following circumstances:

In his closing argument to the jury, the prosecuting attorney, referring to a letter bearing petitioner's signature which was mailed to one Smith, a government witness (R. 174-175), and which was the mail matter involved in the first count of the indictment (R. 8-9), said (R. 225):

> Now this letter is in Count 1. That is the one that is alleged, and you have to believe beyond a reasonable doubt; first, that there was a scheme devised by this defendant, either by himself or in connection with Boyer, and that they caused—either put or caused to be placed in the mail for transmission that letter. There is no question but that that letter went through the mail from Miami to A. C. Smith of San Antonio, Texas, and that he received it and produced it here. There is no dispute about that and no denial.

No objection was registered to this statement at the time, but after the prosecutor had completed his summation and the jury had been excused, petitioner's counsel moved for a mistrial on the ground (R. 226) that the prosecutor—

> * * * while discussing the case before the Jury, referred to the defendant * * * as having not taken the witness stand in that he * * * referred to an exhibit * * * as being an instrument signed by the defendant bearing his signature, and * * * laid the instru-

ment out on the table in front of the Jury, and glancing in the direction of the defendant, said "There is no dispute about that and no denial."

In denying the motion, the court said (R. 229-230):

> * * * The part of the argument that is excepted to which has to do with the District Attorney's remarks to the jury that there was no dispute about a certain letter and no denial —The Court observed the District Attorney at the time this part of the argument was made and recalls that it was made after both counsel for the defense had argued the case, and I did not observe any gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark here that there was no dispute and no denial. My interpretation of the remark was that he had reference to the argument of counsel. That he was answering the argument of counsel. His argument was in rebuttal of counsel for defendants; and he was dwelling upon that when he said there was no dispute about that and no denial. Therefore the Court did not interpret it to mean that the defendant hadn't testified or that the defendant himself hadn't denied it. I don't think that any juror could have so interpreted it. I don't see any other logical or reasonable interpretation of that remark except that, in answer to counsel's argument, he stated that there was no dispute

> and no denial as to this particular letter. The Court is of the opinion and finds that there has been no violation of the rules or the law with reference to directing the attention of the Jury to the fact that the defendant has not taken the witness stand. * * *

The circuit court of appeals, in discussing the contention that the denial of the motion for a mistrial was erroneous, said (R. 276):

> * * * The court said he observed the district attorney at the time, and did not see any gesture that would indicate to anyone that he was referring to the defendant as making no dispute or denial, but the court thought he was referring to the argument of defendant's counsel just concluded, and was answering that argument. The court did not understand it as referring to the defendant not having testified and did not think any juror could have so interpreted it. It seems to us that this is the clear meaning of what was said. The facts stated are indeed even now undisputed and undenied by anyone. The inference from them that the defendant mailed it, which is the only thing the defendant could in reason deny, was of course disputed, but was not included in the statement. We see no ground for a mistrial here.

ARGUMENT

Petitioner's contention (Pet. 2, 3) that the district court erred in refusing to grant his motion for a mistrial is based on the assumption that the

prosecutor, when he said, "There is no dispute about that and no denial," was commenting on petitioner's failure to take the witness stand and deny having sent the letter in question to Smith. The assumption is unfounded. The trial judge, who witnessed the incident, said that he had observed no "gesture of any kind that would indicate to the Court or anyone else that the District Attorney was referring to the defendant when he made this remark," but that, on the contrary, the remark was in reference to the failure of petitioner's counsel to dispute the mailing of the letter in his closing argument. Certainly no one is better situated to interpret the prosecutor's remark than the trial judge, who was present when it was made and who therefore did not have to rely on the cold words of the printed record in interpreting it.

Petitioner, however, points out that his attorney, in his opening statement, had denied generally petitioner's participation in a scheme to defraud (Pet. 8), and argues from this that, in making the remark now complained of, the prosecutor must have been referring to petitioner's failure to testify. But the prosecutor was not referring to the absence of a general denial of guilty participation in the fraudulent scheme; the reference was clearly to the absence of a denial that the letter was mailed to Smith. And, as the trial judge made clear, the remark of the prosecutor was directed

not to the opening statement of petitioner's counsel, but to the latter's failure in his closing argument to deny that the letter went through the mails from Miami to Smith in San Antonio, Texas.

Petitioner (Pet. 7, 9) makes much of the fact that the circuit court of appeals, in giving its reasons for upholding the refusal to declare a mistrial, observed that "The facts stated [*i.e.*, that the letter in question, bearing petitioner's signature, was mailed to and received by government witness Smith] are indeed even now undisputed and undenied by anyone" (R. 276), and argues that this is "the most conclusive and powerfully persuasive argument of all that the United States Attorney was referring to the failure of the petitioner to take the stand" (Pet. 9). But petitioner neglects to quote the immediately succeeding remark of the circuit court of appeals, which contains the point the court was making, *viz.*, "The inference from them that the defendant mailed it, which is the only thing the defendant could in reason deny, was of course disputed, but was not included in the [prosecutor's] statement."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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